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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL FLORES,

Defendant and Appellant.

E060948

(Super.Ct.No. FWV1300123)

OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller,
Judge. Affirmed.

James DeAguilera Law Office and James DeAguilera for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,
Anthony DaSilva, Peter Quon, Jr. and Susan E. Miller, Deputy Attorneys General, for
Plaintiff and Respondent.

After tenants of an industrial park complained of the smell of marijuana, a search
warrant was executed, and several hundred marijuana plants were seized from three

business suites used as a grow. Defendant, Michael Flores, was charged with cultivating marijuana (Health & Saf. Code, §11358) and possession of marijuana for sale (Health & Saf. Code, § 11359). Defendant was tried by a jury, where he asserted, as an affirmative defense, that he participated in a medical marijuana collective, but he was convicted as charged. He was placed on probation and appealed.

On appeal, defendant argues for reversal due to (1) erroneous instructions that allowed the jury to determine the medical marijuana collective and the cultivation was unlawful based on the fact a city ordinance prohibited such activities; (2) prosecutorial misconduct during closing arguments; and (3) the trial court's refusal to allow defendant to reopen his case to admit evidence of his 2011 medical marijuana recommendation by a physician. We affirm.

BACKGROUND

On the afternoon of December 14, 2011, the property manager of a complex of business suites contacted police in the City of Ontario because of complaints about the smell of marijuana emanating from three suites. The property manager informed the officer that defendant was the lessee of the suites, and that the lease indicated defendant conducted a printing business known as New Skin Graphics. Prior to entering the suites, the officer could smell marijuana. The officer contacted a narcotics canine unit. A canine unit came to the industrial complex to have a trained dog sniff the area. The canine unit officer and the trained dog walked around the suites, in the public area, where the canine unit officer could smell marijuana, and the dog alerted to the presence of

marijuana. Based on the dog's response, the officer obtained a search warrant to search the suites and executed the warrant.

Upon entering the first suite, the officer smelled marijuana and observed a marijuana grow. The grow consisted of wooden rooms erected within the suite itself, with open wire racks holding small marijuana plants under fluorescent lighting. He also observed an intricate irrigation system as well as light ballasts¹ and high end lights for growing indoors. There was no permit or other corporate information within the suite. This suite held 444 marijuana plants.

In the next suite, which was connected to, and could be accessed from, the first suite, the officer made similar observations. There were lights, fans, and 73 non-budding marijuana plants on three separate plant beds. The officer also observed two air filters, 11 high-intensity lights, 11 ballasts atop the lights, three exhaust fans, a large tank of carbon dioxide, a wall mounted air conditioner, and three beds of marijuana plants set up with irrigation and a water run-off system. The officer also found a shipping label for tools, addressed to defendant.

In the third suite, the officer found a similar set up. There were 102 budding, mature plants, irrigation beds, 12 high intensity lights attached to 12 ballasts to control energy running to the lights, three exhaust fans, two large air filters, automatic timers, a carbon dioxide tank, and two air conditioning units. Altogether, there were 619

¹ According to Webster's Third New International Dictionary (unabridged), a ballast is "a resistance used to stabilize the current in a circuit (as of an arc lamp, a mercury-vapor lamp, or a fluorescent lamp)".

marijuana plants, of which 288 were seedlings. The officer was familiar with a City of Ontario ordinance, which prohibits cultivation, sales or possession of marijuana for sale.

The following day, defendant came to the police station with an attorney to talk about the marijuana grow. Defendant brought a box of documents, including records of the patients and members of the marijuana cooperative, which he offered to allow the officer to view, but would not agree to allow the officer to photocopy the documents. After being admonished per *Miranda*,² defendant informed the officer that he had a marijuana recommendation card, but the officer did not see it. The defendant also explained that the marijuana grow was for a dispensary he ran in Upland, called Upland Hidden Gardens, of which defendant was the Chief Executive Officer.

Defendant informed the officer he had incorporated in April 2011, paid taxes and had a tax identification number, but did not have his tax identification number with him. He explained that patients purchased or made donations for the marijuana. When asked why the lease for the Ontario suites was in the name of New Skin Graphics, defendant explained he was afraid the company would call the police if they knew what he was doing there. Defendant's sole source of income was revenue from the marijuana dispensary. Defendant also informed the officer that if a member couldn't afford to pay for marijuana, they would work something out.

Defendant was charged with cultivation of marijuana, in violation of Health and Safety Code, section 11358 (count 1), and possession of marijuana for sale, in violation

² Referring to *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

of Health and Safety Code, section 11359 (count 2). He was tried by a jury and testified in his own defense. On the stand, defendant presented Articles of Incorporation for Alliance for Qualified Patient Care (Alliance), filed with the Secretary of State on April 14, 2011. The corporation was intended to be a mutual, non-profit corporation under state law to operate a medical marijuana collective. When defendant set up the medical marijuana collective, he first familiarized himself with state law governing such collectives. Defendant was the president, chief financial officer and secretary of the corporation. Alliance did business in the City of Upland under the fictitious name Upland Hidden Gardens.

Defendant identified a document pertaining to Alliance, with the subheading, Collective Cultivation and Transportation Agreement, which he signed as both president of Alliance, and as a member. The purpose of the agreement was to identify members of the collective who grow marijuana off-site. On September 22, 2011, defendant signed a lease for the location of the Upland Hidden Gardens medical marijuana dispensary. Defendant conducted his growing activities at the Ontario site, after ceasing to operate his graphics business. The graphics business closed down in August 2011. Defendant was aware that the City of Ontario had an ordinance prohibiting the dispensing or cultivation of marijuana.

Defendant learned of the search warrant the day following its execution. He brought a box of documents to the police station, including patient recommendations (referring to a physician's recommendation that the patient use marijuana), the corporate

binder, his own recommendation, and his seller's tax identification. When he presented it the box, the officer just glanced at it.

At that time, there were approximately 3500 members³ of the Upland Hidden Gardens collective. The business grew marijuana for members of the collective. To become a member, a person would have to come into the facility, fill out a membership agreement, and verify he or she had a doctor's recommendation. The membership agreement authorized the collective to grow marijuana on behalf of the members, and marijuana plants were sold only to members.

Defendant began transporting marijuana plant clones in October 2011, but did not harvest any plants because he never had the chance to do so before the search warrant was executed. The collective had operated for such a short time, it had not had an opportunity to generate a positive cash flow. He did not make any money. He paid for overhead expenses out of his own pocket and lived off money he had saved up. He cultivated plants with other members, but did not have any specific records of how many plants each member was supposed to have because a lot of members grew their own, and shared their marijuana with the collective. Marijuana brought to the dispensary by some members was redistributed to other members. Thus, the collective dispensed marijuana from two separate sources: the grow provided by the collective, and the grow of members who grew on their own.

³ Officer Williams testified that the document he was shown indicated there were 2700 members.

At trial, defendant produced medical marijuana recommendations for members of the collective, which were in effect for the year 2013; he did not have records pertaining to the time surrounding the execution of the search warrant because the recommendations expire annually, and were destroyed upon expiration.

The jury returned guilty verdicts on both counts against defendant. He brought a motion for new trial which was denied. At sentencing, the court granted defendant formal probation. Defendant timely appealed.

DISCUSSION

Under two headings, defendant raises three discrete issues, which we discuss in three separate sections.

1. *Instructions*

a. *Background*

After much discussion between the court and both counsel, the court instructed the jury on the affirmative defense to the charges of cultivation of marijuana and possession for sale of marijuana, relating to a lawful medical marijuana collective/cooperative using several special instructions.

Special Instruction No. 21 instructed the jury that defendant was not guilty of the charges if he acted as part of a lawful Medical Marijuana Collective/Cooperative.⁴

⁴ “The defendant is not guilty of Cultivation of Marijuana or Possession for Sale of Marijuana if he acted as part of a lawful Medical Marijuana Collective/Cooperative. [¶] A lawful Medical Marijuana Collective/Cooperative consists of qualified patients, persons with valid identification cards and/or the designated primary caregivers of qualified patients and/or persons with identification cards, who associate collectively or
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Special Instruction No. 22 instructed the jury that to be a lawful medical marijuana collective/cooperative, two or more eligible persons must come together to share the cultivating, processing and distribution of the lawfully possessed marijuana.⁵ Special Instruction No. 23 instructed the jury that in deciding if defendant had associated with others to cultivate and possess marijuana for medical purposes as a collective, it should

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cooperatively to cultivate and possess marijuana for medical purposes. [¶] A Qualified Patient is an individual who has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana. [¶] A Person with an identification card means an individual who is a qualified patient who has applied for and received a valid identification card. [¶] A primary caregiver means the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person. [¶] In this case, you must decide if the defendant has produced evidence to establish that he associated collectively or cooperatively with others in a lawful marijuana collective/cooperative, to cultivate and possess for sale marijuana for medical purposes. [¶] The defendant's burden of proof is to raise a reasonable doubt. If you are satisfied that the defendant has met his burden you must find the defendant not guilty."

⁵ "To be a lawful medical marijuana collective/cooperative, two or more eligible persons must come together to share the cultivating, processing and distribution of the lawfully possessed marijuana. The eligible persons are defined in instruction 21. [¶] Individual eligible persons can possess and cultivate any amount of marijuana reasonably necessary for that person's current medical condition. [¶] The collective can cultivate and possess for sale only the amount of marijuana required to meet the needs of the eligible persons that have joined together to form the collective/cooperative. Cultivation and/or possession of more marijuana than required to meet the needs of the eligible persons that have joined together to form the collective/cooperative make the collective/cooperative and unlawful marijuana collective/cooperative. [¶] The collective cannot distribute marijuana to persons not a part of the collective/cooperative. Distribution of marijuana to non-members, *[sic]* make the collective/cooperative an unlawful marijuana collective/cooperative. [¶] The collective cannot operate for profit. Operation of the collective for profit, *[sic]* make the collective/cooperative an unlawful marijuana collective/cooperative."

consider 21 factors, which were outlined in the instruction.⁶ Special Instruction No. 24 instructed the jury that it could consider the fact that defendant had violated municipal

⁶ “In deciding if the defendant has associated with others to cultivate and possess marijuana for medical purposes as a collective you may consider the following factors: [¶] (1). Was the group organized in a manner that demonstrated an association for the purpose of cultivating and distributing marijuana for medical purposes for the members of the group? [¶] (2). Was the group organized and operated in a manner that ensured the security of the crop and safeguards against diversion of the marijuana for non-medical purposes? [¶] (3). Did the group maintain records of any monetary payment or any provision of goods or services in exchange for medical marijuana to show that cultivation and distribution is consistent with the medical needs of the members? [¶] (4). Are there records to document that monetary re-imbursements by members were limited to an amount sufficient to a members’ share of the overhead and operating expenses? [¶] (5). Did the group maintain records that the collective/cooperative operated as a non-profit? [¶] (6). Did the group maintain records that the group was not operated for a profit? Any compensation paid by the collective/cooperative to members who perform work should be reasonable. [¶] (7). Did the group maintain a business license and seller’s permit and remit sales tax? [¶] (8). Did the group provide a membership application process that verified the individual’s status as a qualified person, including verifying that a primary care giver’s patient was a qualified patient with a valid recommendation or identification card? [¶] (9). Did the members agree not to distribute marijuana to non-members? [¶] (10). Did the group track when members’ medical marijuana recommendation and/or identification cards expired? [¶] (11). Did the group identify if a member applicant was a member of other collectives and determine a reasonable necessity for membership in multiple collectives? [¶] (12.) Did the group enforce conditions of membership by excluding members whose identification card or physician recommendation are invalid or have expired or who are caught diverting marijuana for non-medical use? [¶] (13). Did the group document each member’s contribution of labor, resources, or money to the enterprise? [¶] (14). Was the source of marijuana from the members of the collective/cooperative? [¶] (15). Did the group document the source of marijuana brought into the collective/cooperative? [¶] (16). Did the group provide a means for facilitating or coordinating transactions between members? [¶] (17). Did the group provide means of facilitating or coordinating transactions between or with individuals that were not members? [¶] (18). Did the group comply with local ordinances? [¶] (19). Did the group form a formal relationship such as a corporation? [¶] The formation of a corporation alone is not sufficient to establish that a medical marijuana collective/cooperative is lawful, however, it is a factor that you may consider along with the other evidence in deciding that there is a lawful collective/cooperative. [¶] (20). There is no set requirement as to how many members must actively be engaged in

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codes of the Cities of Upland and Ontario, which were not charged against defendant, in determining if the medical marijuana collective/cooperative was lawful.⁷ Special Instruction No. 25 instructed the jury how to determine if a marijuana collective/cooperative was a nonprofit enterprise. Special Instruction No. 26 instructed the jury that the Medical Marijuana Program Act established a program to facilitate the identification of qualified patients through a voluntary identification card program.

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the day to day cultivating, processing and distribution, however, you may consider the number of members that are engaged on behalf of the collective in doing those activities. [¶] (21). Were members that were not actively engaged in the day to day cultivating, processing and distribution paying only their share of the costs of the collective? [¶] These factors are things to consider in deciding if the defendant was in a lawful medical marijuana collective/cooperative. You may find that some of these factors do not apply. Apply the factors that you believe are relevant in deciding this issue. [¶] You must determine based on an evaluation of all the evidence, *[sic]* whether the defendant has presented sufficient evidence that he was acting lawfully together with others in a lawful marijuana collective/cooperative to raise a reasonable doubt that the cultivation and possession was *[sic]* unlawful. *[sic]*”

⁷ “The People presented evidence that the defendant committed violations of the municipal codes of both the Cities of Upland and Ontario, that were not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: *[sic]* there was a lawful medical marijuana collective/cooperative. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence.

Defendant argues that the jury instructions relating his affirmative defense that he operated a medical marijuana collective (or dispensary), were erroneous, requiring reversal. Specifically, he urges that it was error to instruct the jury that the medical marijuana collective is “lawful” using criteria from the State Attorney General Guidelines. Instead, he urges that the only proper criterion for determining that a marijuana collective is “legitimate” is whether the collective (or dispensary) makes a profit. He does not point to any particular instruction or any specific language of an instruction which was erroneous. We agree that Special Instructions Nos. 23 and 24 erroneously allowed the jury to consider the municipal ordinance in determining whether the defendant was entitled to rely on the MMP defense, but find the error harmless.

b. The Medical Marijuana Program

In 1996, California voters passed the Compassionate Use Act (CUA) of 1996, to “ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes” (Health & Saf. Code, § 11362.5, subd. (b)(1)(A).) The CUA provides that criminal statutes proscribing marijuana possession and cultivation do not apply to patients who possess or cultivate marijuana for their personal medical purposes upon a doctor’s written or oral recommendation or approval. (Health & Saf. Code, § 11362.5, subd. (d); *People v. Kelly* (2010) 47 Cal.4th 1008, 1012-1013.) The CUA provides an affirmative defense to prosecution for the crimes of possession and cultivation where the marijuana is used for a patient’s personal medical purposes pursuant to a physician’s recommendation. (*People v. Solis* (2013) 217 Cal.App.4th 51, 57.)

The Legislature subsequently enacted the Medical Marijuana Program (MMP) to clarify the scope of the application of the CUA. (Health & Saf. Code, § 11362.7, et seq.; *People v. Solis, supra*, 217 Cal.App.4th at p. 57, citing *People v. Kelly, supra*, 47 Cal.4th at p. 1014.) One purpose of the MMP was to protect collectives and cooperatives organized for the cultivation of marijuana for medical use. (*People v. Anderson* (2015) 232 Cal.App.4th 1259, 1273.) Health and Safety Code section 11362.775, embodying a defense for collective or cooperative cultivation, thus provides: “Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Sections 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.”

Recent decisions endorse a conception of a medical marijuana collective or cooperative protected by Health and Safety Code section 11362.775, according to which day-to-day business operations can involve buying from grower members and selling to consumer members, so long as all members are patients or primary caregivers, all the buying and selling is done on a nonprofit basis within the collective or cooperative, there are no transactions with nonmembers, and the amount cultivated is reasonably necessary for the membership’s medical needs. (*People v. Anderson, supra*, 232 Cal.App.4th at p. 1277.)

The same conception is reflected in the California Attorney General’s Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (Guidelines),

which were developed pursuant to Health and Safety Code section 11362.81, subdivision (d).⁸ Under the Guidelines, a medical marijuana collective is defined as “a business, farm, etc., jointly owned and operated by the members of a group.” (Guidelines, § IV A (2), p. 8.) As such, it should “organize as some form of business to carry out its activities”; and it should not purchase marijuana from, or sell to, non-members. (*Ibid.*) It should provide a means for facilitating or coordinating transactions between members. (*Ibid.*) Further, such organizations must be non-profit operations, pay all relevant sales taxes and obtain necessary Seller’s Permits, verify that members are qualified patients or primary caregivers,⁹ acquire, possess, and distribute only lawfully cultivated marijuana, distribute or sell to members only, follow permissible reimbursements and allocations made in return for medical marijuana, follow possession and cultivation guidelines permitting cultivation and transportation of marijuana in aggregate amounts tied to membership numbers and have records available. (Guidelines, § IV, B, pp. 9-11.)

The Attorney General has also provided Enforcement Guidelines to help identify medical marijuana collectives and cooperatives that are operating outside of state law.

⁸ (Aug. 2008, http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf, as of June 10, 2015.)

⁹ In this regard, the Guidelines recommend that collectives follow application guidelines, which include (a) verifying the individual’s status as a qualified patient or primary caregiver; (b) have the individual agree not to distribute marijuana to non-members; (c) have the individual agree not to use marijuana for other than medical purposes; (d) maintain membership records on-site or have them reasonably available; (e) track when members’ medical marijuana recommendations and/or identification cards expire; and (f) enforce conditions of membership by excluding members whose identification card or physician recommendation are invalid or have expired, or who are caught diverting marijuana for non-medical use. (Guidelines, *supra*, § IV, B (3), p. 9.)

The Guidelines thus point to certain features deemed characteristic of Unlawful Operation, including: (a) excessive amounts of marijuana; (b) excessive amounts of cash; (c) failure to follow local and state laws applicable to similar businesses, such as maintenance of any required licenses and payment of any required taxes, including sales taxes; (d) weapons; (e) illicit drugs; (f) purchases from, or sales or distribution to, non-members; or (g) distribution outside of California. (Guidelines, *supra*, § IV, C (2), p. 11.)

c. Analysis

We review a court's instructions de novo to determine whether they correctly state the law or effectively direct a finding adverse to the defendant by removing an issue from the jury's consideration. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. London* (2014) 228 Cal.App.4th 544, 563-564 [Fourth Dist., Div. 2].) We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088, quoting *People v. Yoder* (1979) 100 Cal.App.3d 333, 338.)

In reviewing a claim that the court's instructions were incorrect or misleading, we must determine whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332, citing *People v. Cross* (2008) 45 Cal.4th 58, 67-68.) We make our determination using the independent or de novo standard of review. (*People v. Ramos, supra*, 163 Cal.App.4th at p. 1088.)

In this case, the court gave instructions on the defense afforded by Health and Safety Code section 11362.775, and did so, using the Special Instructions described

above. For the most part, defendant agreed with the language of the Special Instructions. However, defense counsel was concerned about the inclusion of language in Special Instruction No. 23, referring to the Guidelines as factors for the jury to consider in determining whether the collective was lawful or not, because the Guidelines were merely guidelines. Throughout the trial, defense counsel had objected to the interjection of the Guidelines in instructions. The court indicated it intended to retain the reference to the Guidelines.

Defense counsel expressed further concern about the factor relating to compliance with local ordinances, requesting that it be limited to “valid local ordinances.” However, the instruction simply told the jury that in deciding if the defendant was eligible to use the MMP collective defense, it could consider, among other things, whether “the group compl[ied] with local ordinances.” It also instructed that the defendant’s violation of the two city ordinances was a factor to consider in deciding whether there was a lawful medical marijuana collective. During its summation to the jury, the People emphasized the importance of the ordinance against cultivating medical marijuana.

On appeal, defendant argues that it was improper to allow the jury to consider the ordinance in determining whether the collective satisfied the elements of the MMP defense.¹⁰ We agree.

¹⁰ The People argue defendant forfeited the claim because he agreed to the jury being instructed with two of four special instructions that asked the jury to consider whether appellant participated in a “lawful” collective. A fair reading of the record, including discussions of the instructions at the trial level, leads us to conclude defendant’s objection was preserved for appeal. In any event, we may review the
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To be entitled to raise the MMP defense, a defendant must, first, be either a qualified patient, person with a valid identification card or a designated primary caregiver. (*People v. Colvin* (2009) 203 Cal.App.4th 1029, 1037.) Second, the defendant must associate with like persons to collectively or cooperatively cultivate marijuana. (*Ibid.*; Health & Saf. Code, § 11362.775.) If these elements are met, the defendant “shall not solely on the basis of that fact be subject to state criminal sanctions under Section . . . 11358, 11359” (Health & Saf. Code, § 11362.775.)

We recognize that recent decisions have held that the CUA and MMP do not expressly or impliedly preempt the right of municipalities to enact ordinances limiting or prohibiting the operation of medical marijuana collectives, cooperatives and dispensaries notwithstanding the MMP. (See *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 752 (*City of Riverside*).) A city may, therefore, declare such use of premises to be a public nuisance and enjoin such operations. (*Ibid.*) The MMP and CUA, however, nonetheless exempt certain conduct by certain persons from certain *state* criminal and nuisance laws against the possession, cultivation, transportation, distribution, manufacture, and storage of marijuana. (*Id.*, at p. 757.)

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correctness of instructions even in the absence of objection, where the substantial rights of the defendant have been affected thereby. (Pen. Code, § 1259; *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1421.)

Additionally, the court, over defense objection, instructed the jury that it could consider defendant’s violation of the ordinance to show intent to illegally cultivate marijuana.

In *City of Riverside* the California Supreme Court interpreted the statutory scheme relating to medical marijuana as it impacted a local government's inherent land use power. The Court recognized that the MMP was enacted to promote uniform application of the CUA and to enhance access to medical marijuana through collective cultivation by removing specified state sanctions, but that it never expressed or implied any actual limitation on local land use or police power regulation of facilities used for the cultivation and distribution of marijuana. (*City of Riverside, supra*, 56 Cal.4th at p. 759.) It concluded that the fact the MMP exempts the collective or cooperative cultivation of medical marijuana by qualified patients and their designated caregivers from nuisance abatement under *state* law did not bar local jurisdictions from adopting and enforcing ordinances that treat the same activities as nuisances subject to abatement. (*Id.* at pp. 761-762.) It did not hold that the existence of an ordinance prohibiting marijuana collectives deprived qualified persons of the right to raise the MMP defense.

The instructions given in this case erroneously informed the jury that it could consider the existence of an ordinance prohibiting medical marijuana collectives or dispensaries as a factor in determining whether defendant was entitled to raise the MMP defense, and as evidence that the collective was unlawful. In these respects, the instruction was erroneous. Violation of the ordinance means defendant may be the subject of a nuisance abatement action, but it does not, by itself, render the collective unlawful under state law. If defendant established the elements of the affirmative defense, he would have been exempt from criminal prosecution under *state* law, although the City could bring a nuisance abatement action under the ordinance. Nothing in the

other instructions or the arguments of counsel cured the instructional errors. (*People v. London* (2014) 228 Cal.App.4th 544, 565.)

d. Prejudice

Under state law, an erroneous instruction warrants reversal only where a reasonable probability exists that absent the error the outcome would have been more favorable to the defendant. (Cal. Const., art. 6, § 13; *People v. Rivas, supra*, 214 Cal.App.4th at p. 1421.) In other respects, instructional errors—whether misdescriptions, omissions, or presumptions—fall within the broad category of trial errors subject to *Chapman* review on direct appeal. (*People v. Flood* (1998) 18 Cal.4th 470, 499, referencing *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705].)

However, the error was harmless under either standard of prejudice because there was insufficient evidence to support defendant's lawful cultivation defense. (See *People v. London, supra*, 228 Cal.App.4th at p. 565.) Defendant attempted to set up a non-profit collective by incorporating his enterprise, adopting appropriate by-laws, obtaining a sellers permit from the State Board of Equalization, having prospective members sign a collective agreement, and verifying their medical marijuana recommendations. However, he did not produce any financial records to demonstrate accountability to members. With 3500 members (or 2700) at the time of the search leading to the charges, the jury could properly conclude the collective was for profit, absent any financial accounting covering the relevant time period. (See *People v. Jackson* (2012) 210 Cal.App.4th 525, 530.)

Additionally, he produced no records showing that the members of the collective were qualified patients or caregivers at the time of the search. At trial, he produced records for members that pertained to the calendar year 2013. As to those members, their records indicated membership in a collective named Allied Patient Association, not Alliance for Qualified Patient Care, as defendant's collective was named. There was no evidence whatsoever that the 3500 (or 2700) members of the collective in 2011 were qualified patients or caregivers under the MMP.

Under either standard of prejudice, the instructional error must be deemed harmless.

2. *Prosecutorial Misconduct*

Intertwined with defendant's instructional challenge is an argument that the prosecutor improperly argued that the medical marijuana collective/dispensary was unlawful. This issue was not preserved by a timely objection so it was forfeited. "To preserve a claim of prosecutorial misconduct, a defendant must make a *timely* and *specific* objection and ask the court for a curative instruction." (*People v. Smith* (2015) 61 Cal.4th 18, 51; see also, *People v. Centeno* (2014) 60 Cal.4th 659, 674 [failure to object to prosecutor's argument].)

In addition to the failure to object, there is no legal analysis pertaining to this claim of error in the brief. Under these circumstances, where the point has been asserted without legal argument in support, we may treat the issue as waived and pass on it without consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; see also *People v. Marshall* (1990) 50 Cal.3d 907, 945, fn. 9.)

3. *Defendant's Tardy Production of Medical Marijuana Card*

Defendant claims the trial court improperly excluded his medical marijuana card from evidence. However, he did not actually proffer the card into evidence during the trial. Instead, after both parties had rested and discussion of the instructions had taken place, he made a motion to reopen the case in order to admit the card as evidence. In his opening brief, he argues both that the discovery of the card constituted newly discovered evidence sufficient to justify an order granting a new trial, and that it was error to deny his motion to reopen. We disagree.¹¹

A motion to reopen is one addressed to the trial court's sound discretion. (*People v. McNeal* (2009) 46 Cal.4th 1183, 1202.) In determining whether a trial court has abused this discretion, we consider four factors: “(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence.” [Citation.]” (*People v. Jones* (2003) 30 Cal.4th 1084, 1110.)

The evidence of defendant's medical marijuana recommendation was essential to defendant's case, because to invoke the MMP collective defense, he had to prove he was a qualified patient. Defendant was aware of the import of this evidence from the inception of the prosecution, when he had to withdraw his demurrer to the accusatory pleading, at a very early stage, due to the lack of evidentiary support. Although at one

¹¹ Defendant does not present any actual legal argument to support his position. However, in the interests of justice, we address the issue on the merits.

point during trial defendant testified his card was downstairs in the courthouse, this was apparently untrue because he did not produce it the following day as promised. More importantly, that testimony was belied by the argument made in support of his motion to reopen, including the declaration under penalty of perjury by his spouse, where he argued that his 2011 medical marijuana card had gotten lost in a box of Christmas ornaments. So he apparently did not have the card at the courthouse at the time indicated in his testimony.

The People argued in the trial court that reopening to admit the card would deprive it of the opportunity to investigate the authenticity and validity of the card, which had not been produced during discovery. The People would also be deprived of an opportunity to investigate the qualifications of the doctor who made the recommendation as a witness, or to cross-examine that practitioner. These considerations support the trial court's exercise of discretion to deny the motion to reopen because of the very late stage, the fact defendant had not been diligent, and the prospect that the jury would attach too much significance to a piece of evidence of questionable origin.

Even if we were to determine that the court erred, however, we would be unable to find prejudice. Proving that he was a qualified patient was only one element of the MMP defense that defendant failed to satisfy. He also failed to demonstrate that the enterprise did not earn a profit or that the 3500 members who belonged to the collective in 2011 were qualified patients.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

MILLER

J.

CODRINGTON

J.